
US Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409 Boston, Massachusetts 02109

Date: August 18, 1989
Case Nos. 88-ERA-37/38

In the Matter of:

Timothy O'Sullivan
and
Donald W. Delcore, Sr.
Complainant

against

Northeast Nuclear Energy Company
A Division of Northeast Utilities
Respondent

Appearances:

Leon M. Rosenblatt, Esq.
For Complainants

Timothy O'Sullivan and
Donald W. Delcore
Pro Se at the Continued Hearing

Richard K. Walker, Esq.
Nicholas S. Reynolds, Esq.
For Respondent

BEFORE: CHESTER SHATZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DENYING COMPLAINTS

This is a proceeding under the Energy Reorganization Act of 1974, as amended (Act), 42 U.S.C. 5851, and its implementing

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regulations found in 29 C.F.R. 24 whereby employees of employers subject to the Act and regulations may file complaints and receive certain redress upon a showing of being subjected to discriminatory or retaliatory action by employer for participating in protected activity.

These two cases stem from complaints filed by Mr. O'Sullivan on July 4, 1988, and by Mr. DelCore on July 8, 1988. In O'Sullivan's complaint, he alleged that his Employer (Respondent) had engaged, and was continuing to engage, in "an-on-going active and planned program of discrimination, intimidation, blacklisting and coercion" towards him as an electrician at the Waterford, Connecticut, Millstone Unit II Nuclear Generating Station. He indicated that the specific basis of his complaint was "founded on three particularly significant events which occurred between February 3, 1988, and June 20, 1988, as follows":

> Event #1 -- On June 20, 1988 a co-worker and fellow electrician at Millstone Unit II, Mr. Anthony J. Ross, was called to the office of Mr. Jack Keenan who is the Unit II Superintendent. Mr. Keenan stated to Mr. Ross that one of the reasons he was there was that he had been observed by supervision "huddling and in conversation" with a Mr. Donald W. Delcore of the Unit 2 Instrument & Control Department and myself. As both Mr. Delcore & I had filed grievances with Northeast Utilities, the Nuclear Regulatory Commission and the State of Connecticut Human Rights and Opportunities Commission, "it was not in Mr. Ross's best interest to be seen with or involve himself with us."
> Event #2 -- On February 4, 1988 I was forced by Northeast Utilities to attend a medical evaluation session with a Dr. Ian Mitchell without being provided with any reasons for such a meeting. In addition, I was not provided with adequate time to obtain legal advice on this issue. I was given the letter to attend such a meeting @ 2:46 PM on February 3, 1988 and the end of my 8 hour shift is 3:00 PM.
> During the meeting with Dr. Mitchell on February

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> 4, 1988, he stated to me that one of his responsibilities was to "determine if people were suited for continued employment in the nuclear environment."
> I submit that such a statement was not only inappropriate to such a discussion, but was an indirect threat to my continued job security. Furthermore, I interpreted such a statement as a harrassment (*sic*) tactic intended to force a withdrawal of my complaints before the State of Connecticut Human Rights & Opportunities Commission and the Nuclear Regulatory Commission.

> Event #3 -- At my yearly evaluation I was criticized regarding communication on "routine" administrative matters. The stated reason for this was that I wrote a memo to my supervisor regarding "personal time" (see attached) and what I perceived was unfair and unequal treatment as compared with other Departmental employees. I explained that it was my right to submit a written complaint to document such treatment and further that one instance over an 18-month period did not constitute "routine" matters. The conversation was abruptly terminated by my supervisor who stated that he was the boss, he interpreted the meaning of routine, that he was in charge and the decision stood as written. (Note - This evaluation took place in January 1988.)

O'Sullivan stated that he interpreted these actions "as a harrassment (*sic*) vehicle intended to lay the groundwork for future reduction in yearly evaluations which would eventually lead to termination."

Mr. Delcore's complaint states that he is "convinced that Company Management is harbouring (*sic*) ill feelings and prejudices against me for airing concerns to the Nuclear Regulatory Commission" commencing in April 1988, and he

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specifically cites as management harassment the conversation between Keenan and Ross set forth in Event No. 1 of O'Sullivan's complaint above.

I note here that O'Sullivan and Delcore filed their complaints on July 4th (O'Sullivan) and July 8th (Delcore). For reasons discussed in more detail in Part II of this recommended Decision and Order, I find that any events being complained about that occurred more than 30 days prior to the filing of each complaint are time-barred under the statute and, thus, will not be considered here relative to relief, if any, each may have been entitled to if the complaints were timely filed concerning such alleged incidents of discrimination and retaliation.

Not too clear to me is the specific relief being sought by by Complainants. In a required pre-hearing submission by, Complainants' counsel, he stated that "Complainants seek, all damages favorable under the Act, including compensatory damages, counsel fees and costs . . . and an order requiring Respondent to cease and desist from interfering (with) their *employees'* unfettered access to governmental agencies" (emphasis supplied). On the date of hearing, counsel for the Complainants amended his pre-hearing statement and stated that his clients were seeking a finding that their rights guaranteed by Section 210 were violated. Further, that they were seeking an order requiring Respondent to cease and desist from interferring with their *employees'* unfettered access to governmental agencies and that they were not seeking tort or contract compensatory damages. Counsel at the hearing again reiterated that his clients were not seeking monetary damages (TR 47) but were requesting "the company be ordered to instruct not only Delcore and O'Sullivan *but all other employees* that they have a federal right to go to a governmental

agency." (TR 58) He stated that in other words, he was requesting that issue an order to Respondent to cease and desist from interfering with all employees' protected activities. Since the "other employees" have not filed complaints, I concluded that the request for relief as to them is not properly before me and that specific relief as to "other employees" must be denied since I do not interpret the statute as permitting class action suits. Concerning the relief requested as to O'Sullivan and Delcore, it appears to me that the requested relief is overly broad in scope and, if granted, would place the

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Department of Labor in the position of being a superpersonnel department of Employer to handle and review on a continuous basis all future incidents that might be complained about by Delcore and O'Sullivan as being incidents of harassment and retaliation. It, thus, appears to me that the complaints could be dismissed on the grounds that the relief requested does no fall within the ambit of the statute. However, because of the view that I take below, relative to the substantive merits of the complaints, I need not dismiss the complaints on the grounds that the relief requested is overly broad and not contemplated by the statute.

In any event, counsel for Respondent has moved for dismissal of the complaints since he argues that even if the allegations concerning the June 20th conversation between Keenan and Ross are true, they do not rise to the level of adverse employment action since the alleged remarks had no adverse effect on either of them. In this connection, counsel states that if the alleged remarks occurred, they, at most, had a trivial effect on Complainants' terms or conditions employment and must be considered a *de minimus* violation Employer. While I find considerable merit to Employer's argument, I need not dismiss the complaints on the presented by Employer since I find, for reasons below, that the facts do not show that the alleged remarks were ever made or implied and that, therefore, the complaints have no merit and should be denied.

This recommended Decision and Order is divided into two parts. Part I includes Part I-A, setting forth my Findings of Fact and Conclusions of Law, and Part I-B, setting forth additional Findings of Fact and Conclusions of Law. Part II sets forth various rulings made by me, pre-hearing and during the course of the hearing, and my reasons for same. All findings and conclusions relating to the evidence have been reached after hearing the testimony, reviewing the documentary evidence, and observing the demeanor of the witnesses. References to appropriate segments of the record shall be as follows: TR for transcript, CX for Complainants' exhibits, and RX for Respondent's exhibits. The parties stipulated at the start of hearing that both O'Sullivan and Delcore had, prior to June 1, 1988, filed both internal company grievances and external complaints to the NRC.

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Part I-A

Findings of Fact and Conclusions of Law

Background Facts

1. Respondent is engaged in generating electric power by means of nuclear reactors at Waterford, Connecticut. Respondent has stipulated, and I so find, that the provisions of the Energy Reorganization Act are applicable to this proceeding. (TR 4) The facility at Waterford is known as the Millstone facility.

2. There are three reactors at Millstone which are referred to as Units I, II, and III. The Unit II superintendent is John S. Keenan. Reporting to him, among others, are John W. Riley, Jr., the maintenance supervisor for Unit II, and David C. Kross, the instrument control supervisor for Unit II. Reporting to Mr. Riley is James Ferriell, the assistant maintenance supervisor for Unit II. Complainant Timothy O'Sullivan reports to Mr. Ferriell, and Complaint Donald W. Delcore reports to Mr. Kross.

3. Complainant O'Sullivan is an electrician in the maintenance department of Unit II. He has worked for Respondent since November 2, 1981, and assigned to the maintenance department during August 1986 where he performs electrical maintenance work. (TR 93-94) He is thought to be a good electrician and hard worker by his superiors and peers. (TR 270 and 289)

3. Complainant Delcore is also an electrician, who started working for Respondent during March 1979. He first worked in the Unit II maintenance department, and later transferred to the instrument and control department of Unit II sometime prior to the filing of his complaint. His duties included monitoring and operational surveillance of various process instrumentation. (TR 15-16) Delcore's immediate supervisor, Mr. Kross, did not think Delcore was a troublemaker and always found his work to be very satisfactory. (TR 37 and TR 54)

4. Prior to both Complainants' filing their complaints with the Department of Labor, it was a known fact throughout the Millstone Unit II facility that both Complainants had filed

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complaints concerning some alleged safety violations with the Nuclear Regulatory Commission (NRC). In fact, Mr. Delcore had filed a complaint with the NRC during April 1988 and Mr. O'Sullivan filed his complaint with the NRC during January 1988. (TR 30, 34 and 169, 192-193)

5. In addition to filing his complaint with the NRC, O'Sullivan, also prior to June 1, 1988, had filed certain formal and informal internal grievances with Respondent. In fact, one such grievance involved overtime/rest time wherein O'Sullivan was seeking rest time pay amounting to $150.00. Mr. Riley offered to resolve the grievance by paying Mr.

O'Sullivan the money requested with the understanding that such resolution would not set a precedent for future similar situations. O'Sullivan was unhappy about the "non-precedent" condition and did not accept Riley's offer. Rather, he appealed to the next level and kept doing so through all levels provided for by Respondent under its grievance procedures. All levels agreed to pay O'Sullivan with the stipulation that such payment would not be a precedent for future similar situations. However, O'Sullivan refused to accept a check when tendered to him because of the so-called "condition" referred to Above. (TR 172-181, 262, 282, 293-294) Instead, he filed a complaint concerning this matter with the Connecticut Commission of Human Rights and Opportunity (CHRO) on the basis of age discrimination wherein he alleged that co-workers more than ten years younger than he were always paid for rest time without any conditions attached. (TR 182) At the time of hearing, that complaint was still pending at the CHRO.

6. O'Sullivan conceded that he gets frustrated when he does not get prompt answers to his complaints with NRC or to his internal grievances. (TR 169-170 and 190-193)

7. Keenan always preferred his employees to first try to resolve any grievances or complaints on an informal basis before utilizing a formal procedure. However, he never issued any orders to employees under him not to file formal complaints outside the company. This philosophy concerning steps to take in resolving employees' complaints was clearly consistent with the NRC's policy on this matter. In this regard, the NRC resident engineer, in a sworn affidavit dated November 8, 1988 (RX 1), stated that its NRC's preferred position was that a company's employees first address their concerns to company

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management before advising the NRC of such concerns. He also stated that when the NRC is in receipt of an allegation concerning violations at a company facility, it normally would be sent to the company first for action and monitored by the NRC to assure the adequacy of the licensee's response.

8. From the above, I find that prior to June 1, 1988, Mr. O'Sullivan and Mr. Delcore were aware of the fact that they were known throughout Unit II as employees who had filed complaints with the NRC and that, of course, their respective supervisors were aware of this fact.

With the above background in mind, I now proceed to my findings concerning Complainants' allegations relating to a certain conversation concerning them occurring between Mr. Anthony Ross, a co-worker, and Mr. Keenan, the Unit II superintendent, on June 20, 1988 (*see* paragraph No. 3 of O'Sullivan's complaint dated July 4, 1988, and Delcore's Complaint dated July 8, 1988).

9. Anthony Ross is an electrician in the Unit II maintenance department of Respondent's facility and has been so employed for about six years. (TR 60) He is very

friendly with both Complainants and, as, of June 1, 1988, was aware that both Mr. Delcore and Mr. O'Sullivan had previously filed complaints with the NRC.

10. As of June 1988, Mr. Ross was having some difficulties with his immediate supervisor, Mr. Ferriell, relative to job assignments and that also, in Mr. Ross's view, "it seemed like the last year he, Mr. Ferriell, wouldn't talk to me." (TR 61-62) Mr. Ross also had, at that time during early June, some unresolved differences with Mr. Riley about premium pay and Ross's assignment to the day shift rather than the night shift which Ross preferred. (TR 297) As a result of these problems, Mr. Riley arranged for Mr. Ross to meet with Mr. Keenan.

11. On June 20, 1988, Mr. Ross did meet with Mr. Keenan to discuss his problems. It is Ross's testimony that one of the first items raised by Keenan was that it had been reported to him that "Ross had been seen huddling in conversation with Delcore and O'Sullivan" and that he (Keenan) wanted to take care of any safety concerns or problems he had before going to other sources. In other words, Ross felt that with respect to

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any such safety problems or concerns, Mr. Keenan wanted Ross to talk to him first before going to the NRC. Thereafter, they discussed the problems Ross perceived he was having with Mr. Ferriell. Ross told Keenan he thought he might be having problems with Ferriell because he "hung around with Mr. O'Sullivan" (TR 66-71, 79-81), and Mr. Keenan stated that it was possible but that he would talk to Ferriell to inform him to treat Ross the same as the other electricians regardless of whom he associated with. In fact, Mr. Keenan stated that Ross should associate with O'Sullivan because the electrician group was a very small group. (TR 68) Ross testified further that Keenan never stated that O'Sullivan or anyone else was a troublemaker. (TR 69) Ross conceded in his testimony that Keenan informed him that it was perfectly proper to associate with Delcore and O'Sullivan.

12. Despite Keenan's assurances that it was proper for Ross to associate with O'Sullivan and Delcore, Ross left the meeting with the impression that if he continued to associate with them, he would continue to have problems with his supervisors. (TR 69, 79-81) He stated that he got this impression from the fact that Mr. Keenan stated to him that he was seen huddling with Delcore and O'Sullivan. (TR 70) He did not give any credence to Keenan's statement that he should associate with them since he (Ross) felt that Mr. Keenan had to make that statement because of his high position at Millstone.

13. Mr. Keenan testified that he never made any statement that it had been reported to him that Ross was seen huddling with Delcore and O'Sullivan. Keenan also stated that he told Ross that it was proper to associate with Delcore and O'Sullivan. His testimony reflects that he wanted to help Ross with his work-related problems and that he wanted better communications between management and Ross as well as other co-workers. He was concerned from Ross's statements that Ferriell may have been treating Ross in a negative manner because of his friendship with O'Sullivan and Delcore, and he assured

Ross that he would speak to Ferriell so that such conduct on the part of Ferriell, if it existed at all, would not be continued. His testimony reflects, which I find credible, that he specifically told Ross that he had a right to associate with both Delcore and O'Sullivan. Keenan spoke to Ferriell the next day and was informed by Ferriell that Ross was not being treated differently than others relative to work

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assignments and other work-related issues. Ferriell did admit, however, that he found it more difficult to socialize with Ross than he did with the other electricians whom he supervised. Keenan told Ferriell that it was required that he treat all employees under his charge in the same manner as others regardless of any personal feelings he might have against anyone. Keenan told Ferriell that he thought better communication between management and Ross and other employees was needed in order to improve morale.

14. I find, after weighing the testimony of both Mr. Ross and Mr. Keenan, that Keenan did state to Ross that it had been reported to him that Ross had been seen engaging in conversation with Delcore and O'Sullivan. However, I further find that such statement was not made for the purpose of intimidating Ross or for the purpose of encouraging Ross not to associate with Delcore and O'Sullivan but, rather, for the sole purpose of informing Ross that if he ever had any safety problems or concerns to discuss them with Keenan first to see if such concerns could be resolved internally rather than externally by immediately filing a complaint with the NRC. (*See* TR 66-67) I further find that Keenan's indication that any complaints should first be discussed with him was proper and in accordance with the NRC position that complaints should first be reported to appropriate in-house supervision. (*See* Finding No. 7 above)

15. Mr. O'Sullivan, who had been on vacation when Ross met with Keenan on June 20, 1988, returned to work on or about June 27 and, on that morning, when both were in the electrical shop, Ross hollered across the room to him in a joking or jovial manner that "Keenan tells me I got to stay away from you guys, you're troublemakers," apparently meaning O'Sullivan and Del- core. (TR 213) O'Sullivan, upon questioning Ross further, received information from Ross that Keenan had stated to Ross that he "had been seen huddling and in conversation" with Delcore and O'Sullivan and that it was not in his best interest to do so. (TR 153-154) Mr. O'Sullivan reported the conversation he had with Ross to Mr. Delcore later in the day. As a result, both Delcore and O'Sullivan met with Ross at his home either after work that day or later in the week in an attempt to get more details. However, prior to meeting with Ross that day, Delcore got the impression from O'Sullivan that Keenan had indicated to Ross that Ross should not associate with Delcore

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and O'Sullivan because they had previously filed internal grievances and external complaints with the NRC. (TR 33-34)

16. At the meeting with Ross at his home, Delcore got the impression from Ross that "there was no question in his (Ross's) mind when he walked out of that place, out of Jack Keenan's office, that he should not be associating with me or Tim O'Sullivan because that was a major factor that was creating a problem between Tony (Ross) and his supervisor (Riley) and assistant supervisor (Ferriell)." (TR 36)

17. Because of what was reported to them by Mr. Ross concerning his meeting with Keenan on June 20th, both Delcore and O'Sullivan became very upset and felt that they were being discriminated against because of their earlier grievances and complaints to the NRC. Their respective supervisors, upon being informed by Complainants of their serious concerns about the Keenan/Ross meeting, told Keenan that each was extremely upset. Keenan then arranged to meet with each Complainant to "clear the air."

18. O'Sullivan stated that at his meeting with Keenan 'e was told by Keenan that at no time did he state that Mr. Delcore or Mr. O'Sullivan were troublemakers. He testified further that Keenan stated an inference could be drawn from his conversation with Ross that Ross had been seen in conversation and huddling with both Delcore and O'Sullivan. (TR 110-111, 130-131) Heated discussion ensued, and nothing was resolved O'Sullivan left the meeting with O'Sullivan still under the impression that Keenan had implied in his meeting with Ross that Ross should not associate with Delcore and O'Sullivan because of their past behavior in filing internal grievances and complaints to the NRC. Within a few days thereafter O'Sullivan filed the complaint involved in this dispute with the Department of Labor. On July 8th, he also filed a similar complaint with the Connecticut Commission of Human Rights and Opportunities. (TR 185-186) He also thereafter filed written complaints with the NRC concerning what Ross had told him about his meeting with Keenan as well as complaints concerning other work-related matters. (TR 171 and 217-218)

19. Delcore also met with Keenan as a result his supervisor's (Kross's) arranging the meeting. Delcore stated to Keenan that he got the impression from Ross that Keenan had

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given Ross "an indication that he should not be seen in conversation with me (Delcore) or Mr. O'Sullivan because we were agitators or troublemakers" (TR 40), but Keenan denied that he ever made any such statement or implied in any way that Delcore was a troublemaker and that Ross should not associate with him. Delcore left the meeting still upset and still believing that Keenan had indicated to Ross that he was a troublemaker with whom Ross should not associate. As a result he filed his complaint with the Department of Labor on July 8th.

20. The next day after the separate meetings with O'Sullivan and Delcore, Keenan met with Ross and Riley to determine how the misunderstanding could have arisen concerning his earlier meeting with Ross. At this meeting, Ross stated in no uncertain terms that Keenan never referred to Delcore or O'Sullivan as being troublemakers and

never suggested that he stop associating with them. A memo dated July 1, 1988, was handwritten by Keenan concerning the second meeting with Ross. I give full credence to the substance of that memo since it was drafted shortly after the meeting and it is consistent with a memo prepared separately by Mr. Riley, indicating what transpired at this meeting. In this regard, I find that what transpired at the meeting with Ross, Riley, and Keenan to be as stated in Keenan's handwritten memo (CX 34) as follows:

> "I met with Tony Ross and John Riley to discuss the contents of my discussion with Tony that occurred approximately 2 weeks earlier.
> I told Tony that 2 individuals had recently accused me of referring to them as troublemakers supervisors. our discussion clearly indicated he fully understood that the purpose of the meeting was to improve communications in both directions and that no individuals were accused as being a source of the problem and that no individuals were discredited or harassed."

21. Riley also prepared a memo as to what transpired on that date, and I give full credence to it since it was prepared shortly after the meeting without collaborating with Keenan.

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It is consistent with the substance of Keenan's memo mentioned above. Riley's memo (RX 4) reads as follows:

> "Met with Jack Keenan and Tony Ross as the third person to discuss what Jack had heard from, I believe, Tim O'Sullivan *or* Don Delcore on them being troublemakers. Tony stated that he had never told Tim or Don that Jack had said that they were troublemakers. Tony also stated that he never got that idea from Jack at their first meeting. Tony also stated that he never told them that he would testify in Court that Jack had said that they were troublemakers. All in all, Tony felt that his and Jack's first discussion (meeting) was very constructive. He said that Jim Ferriell had said hi to him the following day and that communications seemed to be improved. Jack had talked to Jim after Tony's and Jack's first meeting. Ty (Tony) all this meeting was informed and relaxed. Jack expressed his attitude that he believes alot of our problems are due to communication problems, i.e., people *not* communicating, and that his intent is to enhance communications. In my opinion, face to face communications seem to be relieving alot of the tension. Meeting took approximately 10 minutes."

22. From all of the above findings, as well as my careful consideration of the record as a whole, I conclude that Mr. Ross unreasonably misunderstood and misconstrued the conversation he had with Keenan on June 20, 1988. That misunderstanding led to his comments to O'Sullivan and Delcore that Keenan thought both of them were troublemakers and that he (Ross) would be better off not associating with them. Based on Ross's misunderstanding and his subjective impression reported by him to Delcore and

O'Sullivan, both Delcore and O'Sullivan became extremely upset and had "words" with Keenan at their separate meetings with him. Despite Keenan's attempts to state what actually happened at his meeting with Ross on June 20, 1988, neither Delcore nor O'Sullivan believed his explanation. Instead of "cooling down," they continued to be extremely upset and angry. They both perceived from Ross's discussions with them that Keenan was taking retaliatory action against them

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because they incorrectly believed that Keenan not only thought that they were troublemakers but also indicated to Ross that he should not associate with them.

23. In view of the above findings, I conclude that both Complainants have not proven that Keenan, during his meeting with Ross on June 20, 1988, engaged in discriminatory or retaliatory conduct against them because of their prior conduct in filing either internal company grievances or external complaints with the NRC. As a result of these findings and my conclusions based upon such findings, I find that Complainants allegations of discriminatory or retaliatory action Respondent relating to the Kennan/Ross meeting on or about June 20, 1988, are totally without merit. Moreover, I do not find that the discussion between Keenan and Ross on June 20, 1988 was conduct demonstrating an on-going course of discrimination by the Respondent against either or both Delcore or O'Sullivan

24. I also find that the conversation between Ross and Keenan on June 20, 1988, was not intended in any way to discourage Ross from associating with Delcore and O'Sullivan I further find that Mr. Keenan, at that meeting, did not make any disparaging remarks about Delcore or O'Sullivan and that Ross's impression about what was indicated to him concerning associating with Delcore and O'Sullivan was purely subjective on his part and contrary to the impression Mr. Keenan actually wanted Ross to have. In short, I conclude that both Delcore's and O'Sullivan's complaints concerning the Keenan/Ross meeting on June 20, 1988, are based on Mr. Ross's faulty understanding of what Mr. Keenan intended to accomplish in his discussion with Ross.

25. Central to Delcore's complaint is the event he contends took place on June 20, 1988, wherein he states that "a co-worker, Mr. Anthony Ross, was *told* during a meeting with Mr. John S. Keenan, Unit #2 superintendent that it was not advisable for him to be seen in conversation with me and Mr. Tim O'Sullivan. I was not privy to the exact words used, but my later discussions with Mr. Ross have given me indications that Mr. Keenan *feels I am sort of troublemaker or agitator*" (emphasis supplied). I find that Delcore was under an erroneous impression as to what actually transpired at the Ross/Keenan meeting on June 20, 1988. As found above, and re-stated here, I do not find that on June 20, 1988, at the

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meeting with Ross, Keenan indicated in any way to Ross that Delcore was a troublemaker or agitator or that Ross should stop associating with Delcore. I, thus, find no merit to Delcore's contention that the meeting on June 20, 1988, between Ross and Keenan was an event indicating that Respondent's management was engaging in some continuing retaliatory or discriminatory act against Delcore.

26. Concerning O'Sullivan's complaint to the Department of Labor on July 4, 1988, relative to his assertion that Employer was engaged in an on-going and continuing planned program of discrimination based upon the Ross/Keenan discussion on June 20, 1988, I find that the referenced discussion was neither derogatory nor discriminatory concerning O'Sullivan or anyone else and that such discussion was not an event indicating on-going retaliation or discrimination against O'Sullivan.

27. In view of the above findings I conclude that the complaints should be denied.

Part I-B

Additional Findings of Fact and Conclusions of Law

Complainant has the initial burden of establishing a *prima facie* case, and once doing so, the burden of persuasion shifts to Respondent. The evidence presented complainants in their direct evidentiary case is testimony of O'Sullivan that Ross told him that Delcore and O'Sullivan are troublemakers and should be avoided. While a close call I conclude that, such evidence established a *prima facie* case for Complainants, *assuming arguendo*, that such conduct on the part of Keenan rose to the level of adverse employment action against Complainants. However, based on the testimony of Mr. Ross, Mr. Keenan, and Mr. Riley, I conclude, as indicated in my findings above, that Mr. Keenan neither stated, intimated, nor implied in any way that Complainants were troublemakers or agitators and, also, never stated or implied in any way that Ross should not associate with them. I therefore find that Respondent has carried its required burden of persuasion and has shown that the June 20th conversation between Keenan and Ross was not a discriminatory or retaliatory action against Complainants.

While it is true that prior to June 20th, both Delcore and O'Sullivan were known by management to have filed both (1 internal grievances, formal and informal, and (2 external complaints with the NRC, it does not follow that such knowledge on the part of management equates to discrimination and retaliation. There has been no showing to me that Keenan, or June 20th, intended to retaliate against Complainants for their past filing of internal grievances and external complaints to the NRC. In fact, the overwhelming weight of the credible evidence is that not only did he not intend to but, in fact, did not engage in any discriminatory or retaliatory action against Complainants on June 20th. I find that his meeting with Ross on that date was arranged in good faith by him for the purpose of resolving Ross's concerns about his work assignments and other work-related

issues. While I find that Keenan did state at sometime during his conversation with Ross that it had been reported to him that he had been seen in conversation with Delcore and O'Sullivan, I do not conclude that such remarks were made in a derogatory way. Rather, I find that Keenan, in referring to Delcore and O'Sullivan, was concerned that Ross may have had some safety issues he wanted to raise, and he wanted him to discuss with him *first* any such safety or work-related issues before filing any complaints with the NRC in an effort to determine whether same could be satisfactorily resolved internally. I find that such intent or his part was proper and consistent with NRC policy and was not intended in any way to malign either Delcore or O'Sullivan. also find that he never implied or stated that (1) Delcore and O'Sullivan were troublemakers or agitators or (2) that Ross should not associate with them. While Ross may have inferred from Keenan's remarks that Delcore and O'Sullivan were troublemakers and were to be avoided by Ross, such inferences were clearly not warranted from the actual conversation that took place. Ross's misunderstanding and misconstruction of Keenan's remarks and intent were unfortunately relayed by his to Delcore and O'Sullivan. They then reacted as they did filing the complaints with the Department of Labor based on the erroneous and unwarranted impression Ross came away with after his meeting with Keenan on June 20th.

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Part II

Rulings of Law

This part of my recommended Decision and Order discusses certain rulings made by me pre-hearing and during the course of the hearing relating to (1) discovery proceedings pre-hearing and issuance of subpoenas, (2) time-bar issue and related evidentary rulings, and (3) Complainants' motion to recuse.

Discovery Proceedings Pre-Hearing and Request for Subpoenas

Prior to the scheduled hearing in November 1988, counsel for Employer engaged in extensive discovery by way of taking depositions of Complainants, other employees, and management personnel. No permission was ever granted by me for such discovery proceedings, and no subpoenas were ever authorized by me. Nonetheless, Employer proceeded to pursue formal discovery proceedings and, in fact, requested that the hearing date be continued until its discovery proceedings were completed. denied that request, as well as the request by both parties for issuance of subpoenas. As a result, objections were taken and the rights of the parties were saved in the record for review by the Secretary relative to the discovery and subpoena rulings.

My ruling relative to discovery is based on several grounds. First, I find nothing in 42 U.S.C. 5851 or its implementing regulations authorizing or permitting discovery procedures. Moreover, my review of 42 U.S.C. 5851 and its implementing regulations indicates to me that Congress intended speedy procedures be utilized to resolve employees' complaints of discriminatory or retaliatory action alleged to have been taken

by an employer. In this regard, short time-frames have been set forth in the statute for resolution of complaints. Use of protracted pre-trial discovery would defeat that purpose of the Act since it would prolong the time for reaching trial and, in turn, would prolong the time for issuance of a final decision. Finally, I conclude that pre-trial discovery, allowed, would, in most cases, give an unfair advantage to employers. Employers, as here, have substantial financial resources enabling them to pay attorney fees, costs transcript, and travel expenses related to the taking of depositions which are usually substantial. Employees, on the other hand, usually lack the finances to pay for attorneys to be present at depositions and to pay for deposition transcripts. My interpretation of the statute is that such an unbalanced result favoring employers was not contemplated by

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Congress, since the legislative history of the Act indicated that it was enacted for the benefit of employees. Finally, to permit employers to engage in pre-hearing discovery depositions, in my view, could lead to harassment of a complainant and co-workers and would discourage employees from filing complaints under the Act since, in most cases, they would not be able to afford the expense of participating in such proceedings. In any event, Employer here had ample opportunity to investigate the complaints involved in this case long before the hearing date and should have been able to present a proper evidentiary defense without the need for the sizable discovery procedures it wanted to employ.

Employer argues, however, that constitutional due process considerations require that it be permitted to pursue discovery under 49 U.S.C. 5851 just as it has the right in proceedings before a United States District Court Judge. While I agreed that an employer in this type of case is entitled to some type of procedural due process, I do not agree that such procedure has to be the same as is employed in the U. S. District Courts. Here, Employer is given an opportunity to confront Complainants and their witnesses, to present its own witnesses and to argue orally. Moreover, if Congress intended a full-blown trial with the same procedures used in the District Courts of the United States, it would either have specified in the statute that such trial procedures be utilized or would have specified in the statute that all complaints would be heard in a United States District Court. Rather, Congress provided for speedy resolution of employees' complaints and, as a result, afforded them a hearing procedure somewhat less formal than those employed by a Federal District Court. I do not conclude that the speedy procedure envisioned by 42 U.S.C. 5851 violates constitutional due process rights as argued by Employer.

Concerning the subpoena issue, I find nothing in the 42 U.S.C. 5851 or its implementing regulations authorizing or allowing for the issuance of subpoenas, unlike other Congressional acts expressly vesting the Secretary with authority to issue subpoenas concerning other types of cases over which she has jurisdiction. The parties point to the Administrative Procedure Act (APA), 5 U.S.C. 556(c) 1), providing that a presiding Administrative Law Judge may issue subpeonas *authorized by law*" (emphasis supplied) as my authority for the issuance of subpoenas. However, that section

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of the APA grants authority *if authorized by law*. In my view, that means if authorized *by Congress*. Here, Congress has not authorized the issuance of subpoenas, and since Congress is the sole body having authority to grant subpoena power to an agency, I conclude that an Administrative Law Judge has no authority to issue subpoenas under 42 U.S.C. 5851.

From the above, I conclude as a matter of law (1) that subpoena power has not been authorized by Congress for proceedings under 42 U.S.C. 5851 and that as a result, an Administrative Law Judge has no power to issue same; (2) that the ERA "whistleblower statute" does not contemplate protracted pre-hearing discovery procedures; and (3) that procedures afforded by the Act granting employees a hearing before an impartial Administrative Law Judge, review by the Secretary of his or her decision, and a right to further judicial review pass procedural due-process muster.

Time-Bar Issues

Prior to the start of the hearing, counsel for Employer filed a motion to dismiss the complaints based, in part, on the fact that matters raised therein (aside from the June 20th incident) occurred beyond the 30-day time limit specified in the statute for the filing of complaints. In this regard, the statute, in pertinent part, provides in 42 U.S.C. 5851(b)(1) the following:

> (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within thirty days after such violation occurs, file* (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission. (Emphasis supplied)

I ruled that alleged acts of discrimination set forth in the complaints occurring more than 30 days prior to their

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filing were not actionable since they were time-barred because of not meeting the 30-day filing requirement. Thus, in that connection, I found (1) that Delcore's July 8th complaint of incidents concerning alleged harassment prior to June 8, 1988, would not be considered by me since untimely filed and (2) that the two events listed in O'Sullivan's complaint relating to incidents occurring long before the filing of his complaint on July 4, 1988 (Events 2 and 3 of his complaint), would also not be considered by me since

untimely filed. As a result, I concluded that the only timely complaints were the allegations concerning Keenan/Ross conversation on June 20, 1988.

The above ruling concerning time-bars was made by me based on the specific wording of the statute and my understanding of applicable case law which indicates to me that the time limitations relating to discriminatory acts must be strictly construed. *See English v. Whitfield*, 858 Fed. 2d 957 (4th Cir), discussing the 30-day limitation under the statute involved herein. Moreover, *see also E.E.A.C. V. Penta Industrial Publishing Co. Inc.*, 851 F.2d 835 (6th Cir. 1988) at 837-38, wherein it was stated that "the Supreme Court has indicated that the statutes Of limitations for actions predicated upon employment discrimination are triggered at the time when the alleged discriminatory act occurred and not at the time when the last discriminatory effects have been manifested (citing 449 U.S. 250, 258)." *See also Held v. Gulf Oil Company*, 684 F.2d 427 (1982), wherein it was stated at 430: "with reference to this claim, the Supreme Court of the United States in *United Airlines v. Evans*, 431 U.S. 533, 558, 97 S.Ct 1885, 1889 (1977), stated:

> A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . .separately considered, it is merely an unfortunate event in history which has no present legal consequences.

As a result of my ruling concerning the time-bar issue, I excluded, for the most part, evidence offered concerning the time-barred incidents since even if the June 20th incident would ultimately be found to constitute discriminatory or retaliatory conduct, it could not revive or breathe life into claims that were already time-barred.

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Motion to Recuse

Prior to discussing this motion, some background information will be helpful. In this regard, it is pointed out that the hearing took place in November 1988 and required 2 1/2 days of hearing testimony. Unfortunately, the transcript of the last half-day of hearing could not be furnished by the Court reporter, either because of a malfunctioning tape recorder or an inadvertent erasure by the reporter. As a result, I informed the parties of this fact and suggested that they attempt to enter into a stipulation as to what evidence was taken on the last day based on their notes. (In this connection, my own notes revealed that there were only three witnesses called the last day as follows: (1) Mr. Keenan, as part of the Employer's case, his testimony took less than one hour; (2) Mr. Delcore, called as a rebuttal witness, his testimony was extremely brief; and (3) Mr. Ross, called as a rebuttal witness, his testimony also took less than an hour to complete, and my own notes indicated that his testimony merely reiterated his earlier testimony when called as a witness by Complainants' counsel in presenting their case in chief). Because of the relatively short time it took to complete the evidentiary case on the last half-day of hearing, I assumed that the parties, if they acted in good faith, could readily agree to stipulate what testimony was elicited on the last half-day of the hearing.

The parties entered into discussions in an attempt to draft a stipulation acceptable to both sides. However, despite lengthy negotiations, Complainants' counsel submitted a very brief summary of the missing testimony couched in very general terms and completed in only two typewritten pages, whereas Respondent's counsel submitted a very detailed summary of the missing testimony. After some discussion between counsel for the parties, Complainants' counsel informed Respondent's counsel that they were at an impasse and that further discussions would be futile in resolving their differences concerning any proposed stipulation.

Upon being informed by the parties of the impasse, I advised them that it would be necessary to hold a supplemental hearing to reconstruct the last half-day's record. Hearing was then scheduled, but subsequent thereto, Complainants' counsel requested a continuance because of a conflict with his vacation

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schedule. I granted the continuance with the understanding that rescheduling of the supplemental hearing would occur depending upon availability of courtroom space and my own availability (taking into account my other cases). Thereafter, I learned Complainants were considering obtaining new counsel, and I, therefore, awaited the filing of an appearance of such new counsel. None was forthcoming, and Complainants' original counsel did not file a withdrawal of his appearance. I, thus, rescheduled the supplemental hearing and gave notice to the parties and their respective attorneys of record. Thus, Complainants' original counsel was duly given notice of the new trial date. Despite that fact, he did not appear at the hearing, did not inform me prior to the hearing that he would not appear at the hearing, and, thus far, has not filed a withdrawal of appearance.

On the rescheduled hearing date, Complainants appeared without counsel. When asked by me the reason they were appearing without counsel, Mr. Delcore stated that they could not afford to pay a lawyer (this does not appear in the transcript, but it is my clear recollection of Complainant's response in answer to my question why they had no counsel). This answer seemed strange to me because Complainants' original counsel never conveyed to me, at any time, any suggestion that he would not represent Complainants at the supplemental hearing. In fact, his request for a rescheduling due to a planned vacation indicated to me that he intended to represent Complainants at the rescheduled supplemental hearing. Additionally, he has never withdrawn his appearance of record. In any event, I informed the Complainants that the case would go forward to recreate the last half-day's testimony and that since they had no counsel, I would do my best to protect their rights.

With the above background in mind, I now discuss the motion to recuse. Complainants, a few days before the rescheduled hearing, filed a motion requesting that I recuse myself because of alleged bias which they contend is shown by my earlier rulings concerning the time-bar issues and requested that "a new trial be convened under the

jurisdiction of another Administrative Law Judge." Counsel for Respondent opposed the motion and pointed out that adverse evidentiary rulings do not, by themselves, demonstrate bias and do not require recusal. I found the arguments in counsel's response to Complainants' motion to recuse consistent with my own views concerning the

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allegations of bias and, therefore, cite from his response the following:

> Neither of these arguments provides a basis for the extraordinary remedy sought by complainants. it is well-established that adverse evidentiary rulings do not, by themselves, demonstrate bias" and do not require recusal. *E.g., Blizard v. Frechette*, 601 F.2d 1217, 1222 (lst Cir. 1979) (citing *United States v. Schartz*, 535 F-2d 160 (2d Cir. (1979), *cert. denied*, 430 U.S. 906 (1977)). Thus, this tribunal's ruling that certain evidence would be inadmissible cannot provide a basis for recusal. It is equally well-settled that "a trial judge's comments on lack of evidence" -- such as the tribunal's comment that complainant's case appeared "weak" -- do not demonstrate the pervasive bias that a party seeking recusal must establish. *E.g., Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986) (citing *Whitehurst v. Wright*, 592 F-2d 834 (5th Cir. 1979)); *Ouachita National Bank v. Tosco Corp.*, 868 F.2d 1291, 1300 (8th Cir. 1982) (holding that "a judge should not disqualify himself solely on the basis of prior judicial rulings made during the course of the litigation," and noting that otherwise there would be almost no limit to disqualification motions and a return to "judge shopping"), *adopted in relevant part on rehearing*, 716 F.2d 485 (8th Cir. 1983). In sum, complainants have failed to allege any bias arising outside of the judicial proceedings in this matter, and for that reason their Motion to Recuse should be denied. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) ("The alleged bias and prejudice to be disqualifying [under the federal disqualification statute, 28 U.S.C. § 144] *must stem from an extrajudicial source* and result in an opinion on the merits on some basis *other than that which the judge learned from his participation in the case*.") (emphasis added). See also ABA Code of Judicial Conduct,

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> Canon 3(C); 28 U.S.C. § 455.

In essence, complainants seek recusal of the Administrative Law Judge who has presided throughout the proceedings occasioned by their complaints not because he has engaged in any misconduct, nor because he has a personal conflict or an evident personal bias that challenges his independent judgment, but simply because complainants are dissatisfied with certain rulings issued during the initial hearing and desire another "bite at the apple." Complainants' Motion to Recuse is not the appropriate vehicle by which to achieve this objective, and in any case, complainants have advanced no justification for a new trial.

Based upon (1) the views expressed above, (2) the fact that the evidentiary rulings were based on my understanding of the law, (3) the rulings were in no way based on any bias, prejudgment of the case, or prejudice, and (4) the fact that my mind had been kept open at all times relative to the merits of the case, I denied the motion to recuse, and I, again here, re-affirm that denial.

ORDER

It is hereby recommended that the following order be entered in this case:

It is hereby ORDERED that the complaints of Timothy O'Sullivan and Donald W. Delcore, Sr., be DENIED.

CHESTER SHATZ
Administrative Law Judge

Boston, Massachusetts